95-1451 (3)

Supreme Court, U.S.
FILED
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No.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

Class of Lourdes Gutierrez, et. al.,

Petitioner,

versus

Santa Ana Unified School District, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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A. Statement of Facts

The widespread illiteracy problem at Glen Martin is astounding. As alleged in the Complaint, 75% to 80% of the graduating Students at Glen Martin Elementary School read at levels between kindergarten and third grade. (CT. 65). Why are such a large number of children unable to read even minimally by the end of fifth grade graduation? The School District provides unhelpful excuses, the trial court refused to get involved, and the Students graduate as illiterate victims. The class representative, Petitioner Roberto Gutierrez, is such a victim. So are his parents. The following is an account of their process at Glen Martin Elementary School: the cruel process of no real educational opportunity.

In 1987, Roberto enrolled in Glen Martin Elementary School for kindergarten. Mrs. Gutierrez, a native of Mexico, wanted to ensure that Roberto not use Spanish as a crutch, and enrolled her son in the English immersion program. (CT. 61). This program requires that all of Roberto's classes be taught in English. Roberto's kindergarten teacher informed Mrs. Gutierrez that her son needed to practice his ABCs. Mrs. Gutierrez tried to helped her son learn the alphabet and he improved somewhat. (CT. 61).

In the first grade, Roberto's teacher informed Mrs. Gutierrez that Roberto could not spell because he had difficulty stringing letters together. (CT. 61). Mrs. Gutierrez tried to help her son learn to spell words but was prevented by her limited English abilities. By the second grade, Mrs. Gutierrez realized that Roberto was having difficulty completing his

homework and she was unable to correct his errors. (CT. 61). Mrs. Gutierrez sought help from Roberto's teacher but was told that Roberto did not have a problem and that he just needed to practice the alphabet more. (CT. 62).

In the third grade, Roberto's family moved to Corona for three months where he attended John Adams Elementary School. (CT. 62). During this period, John Adams detected immediately that Roberto had an illiteracy problem, tested him and concluded that despite being a third-grader, he had a first grade reading ability. (CT. 62). The educators at John Adams began an Individualized Education Program ("IEP") to deal with Roberto's learning disability. (CT. 62).

Shortly thereafter, Roberto's family moved back to Santa Ana and re-enrolled Roberto in Glen Martin. (CT. 62). At that time,

Mrs. Gutierrez asked Glen Martin to devise an IEP for Roberto because Roberto was assessed as having reading difficulty. (CT. 62). The principal at Glen Martin informed Mrs. Gutierrez that Roberto had to reapply as a "new student." (CT. 63). Roberto's application to be re-admitted to Glen Martin was "approved" three months later, one month of which Glen Martin was in session. (CT. 63).

When Glen Martin finally readmitted Roberto, his teacher informed him that the teacher would soon meet with the school psychologist and the principal to develop an IEP. (CT. 63). Mrs. Gutierrez was informed that someone at Glenn Martin would contact her within three weeks to discuss Roberto's IEP. Three weeks passed and nobody called. (CT. 63). During this time, Mrs. Gutierrez requested repeatedly that an IEP be developed for Roberto. The principal refused to develop

an IEP for Roberto contending that the school psychologist was busy. (CT. 64). Roberto's third grade teacher insisted that another psychologist be called. (CT. 63). Although another psychologist, Dr. Ramon, was contacted, the School District waited over six months to assess Roberto because the School District failed to inform Mrs. Gutierrez that she had to sign a form to obligate the School District to initiate an IEP for Roberto. (CT. 63, 64, 88). The signing of this pink parent-consent form activates mandatory assessment under the Individual with Disabilities Education Act. ("IDEA").

Glenn Martin Elementary School is not informing parents of the need to sign this pink form, and any teachers who request that a student be assessed under IDEA is harassed until such requests cease. Roberto's fourth

grade teacher, Darlene Carney, was such a teacher

In December 1991, Dr. Ramon made an appointment to meet with Mrs. Gutierrez. (CT. 64). The meeting took place and Dr. Ramon advised Mrs. Gutierrez that her son's problems stemmed from improper instruction and that the problems could be overcome. (CT. 64). At the IEP hearing, however, Dr. Ramon changed his story. He stated that Roberto's learning disabilities stemmed not from improper instruction but rather from auditory and visual problems. (CT. 64).

Confused by Dr. Ramon's contradictory opinions, Mrs. Gutierrez requested that Roberto be assessed by an independent psychologist. (CT. 64). Adela de la Torres was chosen by Petitioners to conduct the battery of testing. After examining Roberto, Ms. de la Torres concluded that Roberto's learning

disabilities were caused by the improper instruction of English. (CT. 64). Since the filing of this Appeal, Roberto recently graduated from Glen Martin with a first grade level in reading. At his graduation ceremony, Roberto received a Certificate of Perfect Attendance.

Students at Glen Martin suffer a similar fate as Roberto. For example, student Elizabeth Esparza received an "A" in spelling and an "O" for outstanding effort. (CT. 66). Despite Elizabeth's "A", she tested at a first grade ability in spelling and is in the bottom one percentile in the United States for this subject. (CT. 66).

What is going wrong with the education process? The causes are many and are based on Respondents' bad faith school-wide policies - policies which deprive the Students of the educational opportunity to

which they are constitutionally and statutorily entitled. Specifically, Respondents willfully and in bad faith refuse teachers' recommendations that a student's learning disabilities be assessed (CT, 65 and 223). In fact, teachers are forced to send notes home with the children to have parents request that their children be assessed for learning disabilities. (CT. 223).

Respondents equally refuse to assess students when their parents request assessment. (CT. 62-63). Even if the student is diagnosed with a disability, as Roberto was, Respondents refuse or unjustifiably delay to develop a special education program for the student. Moreover, Respondents fail to inform or, in fact, misinform parents of their children's progress by (1) refusing to provide the students' low CTBS scores which are addressed specifically to the parents (CT. 107);

and (2) simultaneously giving these students As and Bs in these subjects when CTBS scores indicate their in the bottom percentages nation-wide. (CT, 87, 107-112). Furthermore, Respondents' age promotion policy pushes the students -- like herds of cattle -- to the next grade despite their illiteracy. (CT 65-66, 105-106).

Most disconcerting, however, is the fact that Respondents are tampering with students' files in order to remove any incriminating evidence of their failure to provide an appropriate education. (CT. 223). All these policies are implemented in the hallowed name of education.

Over and over in this story, one is struck by examples of outrageous conduct, gross misrepresentations and/or careless instances of communication failure between child and teachers, between parents and the

school administration, between the Santa Ana School District and outside professionals, between bureaucrats and outside, independent testers. There was no hint of coordination of goals or, in fact, of any joint planning between grades. Each level of Roberto's schooling was run as a separate operation, unburdened by knowledge of what had come before or by preparation for what was yet to come. This breakdown in communication was most apparent, and most infuriating, during Roberto's transition from third and fourth grade, when Glen Martin removed from Roberto's file his IEP prepared by Corona Elementary School.

If this U.S. Supreme Court can learn to listen and see differently, it will hear more than the standard jargon that Respondents are not responsible and see Elizabeth Esparza staring at her book, the "A" in reading at

home on the refrigerator and her confused fear as she continues today to dumbly stare at the page and doodle in the margins while back home Mom and Dad unwittingly gloat about their bright daughter. Everyone is as misinformed as Elizabeth Esparza's parents--except Respondents. They had knowledge of Elizabeth's CTBS scores but failed to inform Elizabeth's parents that despite her "A" in reading she is, in fact, in the bottom one percentile in this subject and functionally illiterate!

[Please note that the Appellate Court's Statement of Facts largely and nearly verbatim follows Petitioners.]

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CLASS OF LOURDES GUTIERREZ, etc. et al.,	)	G013841
	)	
	)	(Super. Ct.
Plaintiffs and Appellants,	)	No. 697402)
	)	
v.	)	
	)	
SANTA ANA UNIFIED	)	
SCHOOL	)	OPINION
DISTRICT et al.,	)	
	)	
	)	
Defendants and	)	
Respondents	)	
----------	)	

Appeal from a judgment of the Superior Court of Orange County, David H. Brickner, Judge, Affirmed.

Emir Phillips and Eleanor Oths for Plaintiffs and Appellants.

Breon, O'Donnell, Miller, Brown & Dannis, Keith V. Breon, Bridget A. Flanangan and Laurie S. Juengert for Defendants and Respondents.

Lourdes Gutierrez filed this action against the Santa Ana Unified School District and its superintendent, Rudy Castruita, on behalf of a class consisting of her son, Roberto Gutierrez, and all students and parents of students of Glenn Martin Elementary School. The First amended complaint alleges negligent instruction, misrepresentation and a host of constitutional and statutory violations; it seeks compensatory and punitive damages, declaratory and injunctive relief, and attorney fees. The trial court sustained the demurrers of the school district and Dr. Castuita (the District) without leave to amend, on the grounds that the complaint failed to state facts sufficient to constitute a class action

lawsuit and failed to state any cognizable cause of action. We affirm.

* * * * *

This action arises out of the frustration and anger felt by Lourdes Gutierrez because her son, Roberto, emerged from five years of instruction at Glenn Martin public elementary school as a fuctional illiterate in the English language. The complaint alleges the District failed to instruct minimal skills and failed to test, evaluate or remedy Roberto's learining disabilities, resulting in irreparable injury. Claiming Roberto's case is indicative of all students at Glenn Martin and that she is able to protect their interests, Gutierrez asks the court to issue an injunction closing Glenn Martin

and giving the operating funds to the parents in the form of vouchers for private education. She also seeks an order requiring the District to notify all parents of their rights and their children's standardized test scores. On behalf of Roberto individually, she ask for compensatory and punitive damages and attorney fees.

The first amended complaint sets out Roberto's educational experience in some detail. While Roberto was enrolled in kindergarten through second grade, Gutierrez was informed of Roberto's problem with spelling, but she was otherwise reassured about his progress. During Roberto's third grade year, however, the family moved to the City of Corona for three months, where he

attended John Adams Elementary School. There, Roberto was tested because of an "illiteracy problem," and it was discovered that he had a first grade reading level. An individualized educational program (IEP) was initiated for Roberto.

When the family returned to Santa Ana (and Glenn Martin), Gutierrez, unaware the the IEP process had been started at John Adams and the documentation had been transferred to Glenn Martin, asked the principal to initiate its own IEP. She was repeatedly promised an IEP but nothing was done for almost one year. She was told Roberto needed help in reading, writing, and spelling and that special classes would be developed for Roberto, but nothing was done. Finally, at the insistence of

Roberto's third grade teacher, Roberto was evaluated by a district psychologist, Dr. Ramon.

When Roberto was enrolled in the fourth grade, Dr. Ramon met with Gutierrez; he informed her Roberto was "a strong and smart boy but had never been taught correctly," and his problems could have been overcome. Roberto's fourth grade teacher finally explained to Gutierrez that she needed to sign a for to legally obligate Glenn Martin to conduct an IEP within 60 days. At the ensuing IEP hearing, Dr. Ramon changed his conclusions and stated Roberto's problems arose from auditory and visual problems. Confused by the discrepancies in Dr. Ramon's opinions, Gutierrez requested another IEP to be conducted by an

independent psychologist. The independent psychologist, Adela de la Torres, concluded Roberto's deficiencies were caused by the improper instruction of English.

When the first amended complaint was filed, Roberto was repeating the fourth grade and attending special classes three hours a day. He was "humiliated by his illiteracy."

Gutierrez alleges the District has a "no retention" policy that requires students to be promoted to the next grade based on their age rather than their abilities. This policy discourages teachers from identifying and testing students with learing disabilities, preparing remedial programs for them, and accurately assessing their skills and communicating

the assessments to parents. Parents receive no notification or explanation of poor scores on the California Test of Basic Skills (CTBS) while their students receive passing grades on their report cards. Thus, parents are erroneously assured their children can read and write English. Furthermore, parents are not informed of forms requiring their signatures to retain a child or to initiate an IEP.

Based on these facts, Gutierrez alleges 10 causes of action. The first is for negligence in : failing to discover Roberto's reading and writing disabilities; allowing him to pass to the next grade level; assigning him to classes and instructors not suited to his needs; failing to inform parents of their children's educational progress; and failing to promulgate a

minimum course of instruction and a minimum standard of proficiency to pass each grade. Roberto's damages include learning deficiencies which have rendered him handicapped, psychological harm, his diminished earning capacity, and the costs of a tutor.

The second cause of action is for intentional misrepresentation to the parents that the students were performing at or near grade level when in fact they were seriously below grade level and in need of remedial instruction. The parents relied on these misrepresentations and failed to obtain remedial instruction for their children. The District also intentionally failed to disclose the students' poor CTBS scores to the parents. The damages alleged are personal to

Roberto and the same as the first cause of action. Guiterrez seeks punitive damages.

The third cause of action repleads the second in form of negligent misrepresentation. The fourth cause of action is for intentional infliction of emotional distress. The fifth cause of action is for breach of an implied contract between the taxpayers and the state, of which Roberto is an alleged third party beneficiary.

In the sixth cause of action, Gutierrez alleges the District has violated the United States Constitution by denying Roberto and members of the class equal educational opportunities, and by failing to provide them with "an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech

and for full participation in the political process." Gutierrez also alleges a deprivation of the class members' right to liberty by "forcing them to attend Glen [sic] Martin Elementary School" without providing them the opportunity to acquire minimal skills.

The seventh cause of action alleges violations of the California Constitution by the deprivation of the class members' "fundamental right to education," the denial of equal educational opportunities and their right to liberty.

The eighth cause of action alleges a violation of the District's statutory duty under the Education of All Handicapped Children Act (IDEA)[1] by not providing a

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[1] EAHCA was amended in 1990 and is now known as the Individuals with Disabilities Education Act (IDEA).

free and appropriate education to all handicapped children. The ninth cause of action alleges violations of the Rehabilitation Act by failing to adhere to proscribed regulations and federal and state policies regarding educational rights of handicapped children. And the tenth cause of action alleges a violation of 42 United States Code section 1983 for discrimination against handicapped children.

I. Claims Based on Educational Malpractice

The theory underlying Gutierrrez's first cause of action for negligence, educational malpractice, has been rejected by the appellat courts. In *Peter W. v, San Francisco Unified Sch. Dist.* (1976) 60

Cal.App.3d 814, the plaintiff, who had recently graduated from high school following twelve years of public instruction, alleged negligence against the school district in terms remarkably similar to those in the complaint before us. He claimed school officials failed to provide him with adequate instruction by failing to discover his reading disabilities, passing him to higher levels without the requisite competency, and assigning him to classes and teachers unsuited to his needs. The court analyzed the pleading in terms of whether there was a legal duty of care, the breach of which would sustain a cause of action for negligence.

After establishing that the existence of a duty of care presents a pure question of law, the court stated, "Judicial

recognition of a duty in the defendant, with the consequence of his liability in negligence for its breach, is initially to be dictated or precluded by consideration of public policy." (**Id**. at p. 822) The traditional policy considerations when contemplated a new area of tort liability led the court to conclude no duty of care could exist. "We find in this situation no conceivable 'workability of a rule of care' against which defendants' alleged conduct may be measured [citation], no reasonable 'degree of certainty that ... plaintiff suffered injury' within the meaning of the law of negligence [citation], and no such perceptible 'connection between the defendant's conduct and the injury suffered,' as alleged, which would establish

a causal link between them within the same meaning. [Citation.] (**Id.** at p. 825)

The court found that practical considerations also weighed heavily against an actionable duty of care in educators. "Few of our insitutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale

rejections of school bond proposals, and in survey upon survey. To hold them to an actionable 'duty of care', in the discharge of their academic functions, would expose them to the tort claims--real or imagined--of disaffected students and parents in countless numbers. They already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. [Citations.] The ultimate consequences, in terms of public time and money, would burden them--and society-- beyond calculation." (**Ibid.**; see also, **Chevlin v. Los Angeles Community College Dist.** (1989) 212 Cal.App.3d 382.)

Gutierrez urges us to disagree with ***Peter W.***, arguing the issue is really a question of proximate cause for the jury,

i.e. was the District's negligence a substantial factor in Roberto's illiteracy? But this approach presents the same pitfalls inherent in the duty analysis: "The 'injury' claimedhere is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified." (***Peter W. v. San Francisco Unified Sch. Dist.,*** ***supra***, 60 Cal.App.3d at 824.) We agree with the ***Peter W.*** court and decline to

create an actionable duty of care in those who administer the academic phases of the public educational process.

The fifth cause of action, for breach of an implied contract, has also been rejected by previous decisions as a thinly disguised claim for educational malpractice. In ***Chevlin***, the plaintiff sued the community college district after she was terminated from its nuclear medicine technology program and from her employment as a program intern, alleging multiple causes of action including negligence and breach of contract. The defendant had entered into affiliation agreements with the hospitals and, like Gutierrez, the plaintiff asserted she had standing as a third-party beneficiary. The court distinguished

Zumbrun v. University of Southern California (1972) 25 Cal.App.3d 1 where a student was permitted to seek recovery for tuition and other fees the final month of a class in protest of the United States' invasion of Cambodia. "Here, however, Chevlin is suing a public institution and seeking compensatory damages for her inability to find employment as a nuclear medicine technologist. We think it obvious that to permit Chevlin to recover under a breach of contract theory based on educational nonfeasance would be tantamount to permitting her to sue for negligence which is precluded under the ***Peter W.*** decision. Whether framed as a negligence or breach of contract theory the harm which Chevlin seeks to redress is the same." (***Chevlin v. Los Angeles***

Community College Dist., supra, 212 Cal.App.3d at p. 390.) The same rationale applies here.

II. Claims based on Constitutional Violations

In the sixth and seventh causes of action, Gutierrez alleges a jumble of state and federal constitutional violations. But they all boil down to a claim for inadequate education.

A. Equal Protection

Gutierrez apparently claims a violation of the equal protection clauses of the state and federal constitutions by alleging that Roberto and members of the class have been denied "equal educational opportunity." An essential allegation of an equal protection violation under both

state and federal law is that persons similarly situated are singled out for unequal treatment on an impermissible basis. (***City of Cleburne v. Cleburne Living Center, Inc.***, (1985) 473 U.S. 432; ***Educational and Recreational Services, Inc. v. Pasadena Unified Sch. Dist.*** (1977) 65 Cal.App.3d 775, 785; ***Smith v. Philadelphia School Dist.*** (6th Cir. 1986) 807 F.2d 75, the court rejected a similiar challenge from a deaf child who claimed he was denied an education commensurate with his needs. "[Gallagher] never explains how he was treated any different from any similarly situated students. The essence of his claim does not constitute a valid equal protection challenge. When a handicapped child does not allege that he

has been singled out or treated differently from the non handicapped child, but rather needs additional special services, the fourteenth amendment is rarely implicated." (***Id.*** at p. 79, emphasis omitted.)

Gutierrez also attempts to bolster her equal protection claim by contending she has alleged the denial of a fundamental right, thus subjecting the District policies to strict scrutiny. Although the right to an education is not guaranteed under the federal constitution (***San Antonio Independent School District v. Rodriguez*** (1973) 411 U.S. 1, 35-36), it is a fundamental right under the California Constitution (***Serrano v. Priest*** (1976) 18 Cal.3d 728, 767-768). But that right has been interpreted as the

right to equality of funding or access to education, not the level of quality. (***Ibid., Butt v. State of California*** (1992) 4 Cal.4th 668.) In ***Butt***, the Supreme Court made that clear: "Of course, the Constitution does not prohibit all disparities in educational quality of service. Despite extensive State regulation and standardization..., the experience offered by our vast and diverse public school system undoubtedly differs to a considerable degree among districts, schools, and individual students. These distinctions arise from inevitable variances in local programs, philosophies, and conditions. '[A] requirement that [the State] provide [strictly] "equal" educational opportunities would thus seem to present an entirely unworkable

standard requiring impossible measurements and comparisons....' [Citation.] Moreover, principles of equal protection have never required the State to remedy all ills or eliminate all variances in service." (***Butt v. State of California, supra,*** 4 Cal.4th at p. 686.)

B. Due Process

Gutierrez claims her allegations demonstrate that Roberto and members of the class were denied substantive and procedural due process because they were forced to attend a school where they failed to learn. Citing ***DeShaney v. Winnebago Cty. Soc. Servs. Dept.*** (1989) 489 U.S. 189, she claims the students were deprived of liberty without due process. But ***DeShaney*** discusses deprivations of liberty resulting in the

denial of basic human needs: "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs--eg., food, clothing, shelter, medical care, and reasonable safety--it transgresses the substantive limits on the on state action set by the Eighth Amendment and the Due Process Clause." (***Id.*** at p. 200.) Compulsory school attendance laws do not create a special relationship between the student and the school. (***Graham v. Independent Sch. Dist.*** (10th Cir. 1994) 22 F3d. 991, 994.)

Gutierrez also claims the District has taken away the students' "legitimate entitlement to a public education as a

property interest which is protected by the Due Process Clause...." (***Goss v. Lopez*** (1975) 419 U.S. 565, 575.) Unlike the situation here, however, the constitutional affront in ***Goss*** was a student's total exclusion from the educational process during a 10-day suspension imposed without a hearing. The court found the right to an education extended by the state could not be withdrawn "on the grounds of misconduct absent[] fundamentaily fair procedures to determine whether the misconduct has occurred." (***Ibid.***)

III. Claims based on violations of statutory duties

A. Individuat with Disabilities Education Act

Gutierrez's eighth cause of action alleges a violation of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400, subd. (c).) We seriously question whether all children at Glenn Martin Elementary School (the proposed class) or even Roberto individually fit with the definition of children with disabilities under the act.[2] But in any event, Gutierrez has failed to allege the required

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[2] The definition of "children with disabilities" includes children with "specific learining disabilities... ¶ who, by reason thereof, need special education and related services." (§ 1401, subd. (a)(1)(A).) "Children with specific learning disabilities" is defined as "those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations," but the definition specifically excludes "children who have learning problems which are primarily the result of...environmental, cultural, or economic disadvantage." (§ 1401, subd. (a)(15).)

element that Roberto (or the class members) has exhausted his administrative remedies. The statute expressly provides that the right to bring civil action in state or federal court obtains only to a plaintiff who is aggrieved as the result of the findings and decision of a due process hearing conducted by the state educational agency. (20 U.S.C. § 1415, subds. (b)(2), (c), (e)(2). See also, ***Buffolino v. Bd. of Educ. of Sachem Cent. Sch. D.*** (E.D.N.Y. 1990) 729 F.Supp. 240.

Gutierrez does not claim Roberto or any other class member has exhausted his administrative remedies; but she argues it would be futile to do so because "[t]he school has limited hearing officers and it would take years to adjudicate hundreds

of Plaintiffs' claims to an appeal level." This, of course, is mere speculation which does not suffice to excuse the exhaustion of administrative remedies for the class as a whole. (***Jackson v. Fort Stanton Hosp. & Training School*** (D.N.M. 1990) 757 F.Supp. 1243, 1304, revd. on other grounds (10th Cir. 1992) 964 F.2d 980.) Furthermore, a due process hearing for Roberto was scheduled to take place during the pendency of this appeal, [3] demontrating that his claim under IDEA was premature, at best.

B. Rehabilitation Act of 1973

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[3] This court has taken judical notice of the notice of hearing issued by the Special Education Hearing Office scheduling a due process hearing in Roberto Gutierrez v. Santa Ana Unified School District (SN 407-93) for October 7 and 8, 1993. (Evid. Code, § 452, subd. (c).)

Similarly, Gutierrez's ninth cause of action under the Rehabilitation Act of 1973 (29 U.S.C. § 794)[4] fails for lack of exhaustion of administrative remedies. When seeking relief by way of a civil action under the Vocational Rehabilitation Act that is also available under the IDEA, a plaintiff must exhaust administrative remedies to the same extent as is required under IDEA. (20 U.S.C. § 1415, subd. (f); ***Calhoun v. Illinois State Bd. of Educ., Etc.*** (N.D.Ill. 1982)550 F.Supp. 796)

4The purpose of the Rehabilitation Act is to assure that federally assisted programs and activities are operated without discrimination on the basis of a disability. (29 U.S.C. ¶794.) A claimant under the Act must be disabled such that he has a physical or mental impairment which substantially limits a major life activity. (31 C.F.R. § 104.3(j).) Gutierrez's unsupported assertion that severe functional illiteracy meets this definition is not plausible.

C. 42 United States Code section 1983

Gutierrez also attempts to state a claim under42 United States Code section 1983 of the Civil Rights Act. To be entitled to relief under this section, a plaintiff must show that a person acting under color of state law acted to deprive him of constitutional right. (***Mason v. Waukesha County*** (E.D.Wis. 1994) 855 F.Supp. 282, 285.) As discussed above, Gutierrez has not done this. Absent the effective pleading of an independent constitutional violation, she cannot seek redress for the denial of an appropriate education under the Civil Rights Act. A plaintiff cannot "circumvent the procedural requirements of the two comprehensive statutes dealing with

handicapped individuals [IDEA and the Rehabilitation Act] by going directly...under § 1983 to obtain an adjudication that [she] had been denied the benefits of those statutes." (***Austin v. Brown Local School Dist.*** (6th Cir. 1984) 746 F.2d. 1161, 1166.)

IV. Miscellaneous Claims

Gutierrez's second and third cause of action, for intentional and negligent misrepresentation, are barred by Government Code section 818.8, which grants immunity to a public entity for injuries caused by misrepresentations of its employees, whether intentional or negligent. (***Chevlin v. Los Angeles Community College Dist., supra***, 212 Cal.App.3d at p. 390.)

Gutierrez does not argue her fourth cause of action, for intentional infliction of emotional distress, should have survived the demurrer; thus she has waived any error on appeal. It is clear, however, that she has failed to allege any facts to support the requisite outrageous conduct or the intent to cause severe emotional distress. (***Cervantez v. J.C. Penny Co.*** (1979) 24 Cal3d. 579, 593.)

Gutierrez makes no argument or showing that she can amend to cure these pleading deficiencies; because none of the causes of action survive as to Roberto individually, we need not discuss the propriety of the class action. Accordingly, the judgment is affirmed.

/s/WALLIN
WALLIN,
ACTING P.J.

WE CONCUR:

/s/ SONENSHINE
SONESHINE, J.

/s/ CROSBY
CROSBY, J.

Fourth Appellate District Division Three
No. G013841
SD45718

IN THE SUPREME COURT OF CALIFORNIA

CLASS OF LOURDES GUITIERREZ, Etc. Et Al.,
Appellants

v.

SANTA ANA UNIFIED SCHOOL DISTRICT Et Al., Respondents

Petition for review DENIED.

Chief Justice

NEWSPAPER ARTICLE

(Re-typed in double space)

School that was sued scores low in reading. Martin Elementary ranks below district average.

By Dan Broomkin

The Orange County Resgister

Just how well do students in the Santa Ana Unified School District read?

Not too well, according to test results released Monday in the wake of a mother's allegation that the district failed to teach her child properly. In a lawsuit filed against the district, she said her son spent five years at Martin Elementary School without learning to read.

According to results of standardized tests in both English and Spanish, the

average second-semester fourth-grader in the district reads at a 2.6 to 3.1 grade level.

District administrators said they are doing at least as good a job as can be expected considering the disadvantaged backgrounds of many of their students.

"We need to put the scores in context," district spokeswoman Diane Thomas said.

She said most students arrive in the district not speaking English and often are tested in English before they have developed the fluency and sophistication needed to excel.

"We also need to consider the basic academic skills that students bring to school," she said. Often, their families "have limited time and money to provide educational reinforcement."

Sometimes students arrive in kindergarten with "no academic experience,

not knowing how to hold pencils, or not knowing their colors," Thomas said. Other students arrive in later grades with little or no educational background.

"What we want to do is measure acheivment by looking at the level at which the students enter ..... (not legible) .....

A date for the preliminary hearing on parent Lourdes Gutierrez's lawsuit has not been set.

• **TEST RESULTS:** Scores districtwide and for Martin Elementary students.